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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 13 Original.

EX PARTE, THE REPUBLIC OF COLOMBIA,
PETITIONER.

BRIEF FOR PETITIONER.

WM. G. JOHNSON,
Counsel for the Republic of Colombia.

THE LAW REPORTER COMPANY, PRINTERS, WASHINGTON, D. C.

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EX PARTE, THE REPUBLIC OF COLOMBIA, PETITIONER.

BRIEF FOR PETITIONER.

Statement.

This is a petition for a writ of mandamus to the Circuit Court of the United States for the Northern District of West Virginia, to require that court to vacate the decree entered by it on the 16th of July, 1903 (petition, pp. 7–9), in the case of The Republic of Colombia *vs.* The Cauca Company and The Colombia Construction and Improvement Company, under the mandate of this court, issued in said cause upon the appeal hereto from the United States Circuit Court of Appeals for the Fourth Circuit.

The ground of the application is that the said decree of the Circuit Court for the Northern District of West Virginia is not in conformity with the opinion and mandate of this court, in that it decrees that the petitioner shall pay to the Cauca Company the sum of one hundred and ninety-three thousand two hundred and four dollars and two cents ($193,204.02) with interest thereon from the 26th day of January, A. D. 1898, whereas, by the opinion and mandate

of this court the said circuit court was not directed to allow any interest, but was only authorized and empowered to enter a decree confirming the award in said cause mentioned for and up to the sum of $193,204.02 without more.

The cause was heard in this court on April 23d and 24th, 1903, being cause No. 259 of October term, 1902, and was decided May 18, 1903 (190 U. S. 524), the mandate of this court being issued on the 20th of June, 1903 (petition, pp. 5–6).

The cause was a proceeding in equity by the petitioner against the Cauca Company and another, to have a certain award by arbitrators for the sum of $462,048.93 decreed to be null and void for various reasons, among others, that the arbitrators had exceeded their authority under the submission by including in their award allowances for alleged expenditures in respect of matters not within the scope of the submission.

The circuit court, in its original decree, held that certain items, aggregating $104,644.91, were without the submission, and therefore invalid, and disallowed the same, but confirmed the award, less that amount and for and up to the sum of $357,404.02, with interest from January 26, 1898 (petition, p. 3).

This decree was affirmed by the United States Circuit Court of Appeals for the Fourth Circuit (petition, p. 5), but, upon appeal to this court, it was held that further items, aggregating $164,200, were also improperly allowed in said award (opinion, appendix, p. 15, 190 U. S. 532), and the decree of the United States Circuit Court of Appeals for the Fourth Circuit was reversed with costs. The cause was remanded to the Circuit Court of the United States for the Northern District of West Virginia, with directions to enter a decree confirming the award for and up to the sum of $193,204.02 (petition, p. 6).

The circuit court, upon receipt of the mandate, instead of confining itself to the entering of a decree confirming the

award for and up to the sum of, $193,204.02, as directed by the said mandate of this court, added to its decree against the objection of petitioner (petition, p. 10) the following provision:

> "And it is further adjudged, ordered, and decreed that the said sum of one hundred and ninety-three thousand two hundred and four dollars and two cents ($193,204.02) in gold coin of the United States of America be paid by the Republic of Colombia unto the Cauca Company, with interest at 6 per cent thereon from the 26th day of January, A. D. 1898" (petition, p. 9).

ARGUMENT.

Although, by the final adjudication of this court reducing the original award from $462,048.93 to the sum of $193,204.02, the award is shown to have been erroneous to the extent of $268,844.91, yet the decree of the court below imposes, as a penalty against the petitioner, by way of interest, a sum exceeding $62,000 for the necessary time consumed in the proceedings taken by it to rectify this error; and this, notwithstanding the fact, as shown by the record on appeal to this court, that all the erroneous items constituting this enormous excess were included in the award against the objection of the petitioner, at the insistence of the defendants, and the maintenance of each and everyone insisted upon in the judicial proceedings taken by the petitioner to correct the award.

Because of the provisions of the act of Congress of March 3, 1891 (26 St. 826), no direct appeal lies to this court from the decree of the circuit court. This court having, however, the right to construe its own mandate, it is submitted that the proper course to pursue to correct this error, if error it be, is by mandamus from this court.

> In re Washington & Georgetown R. R., 140 U. S. 91, 95.
>
> Gaines *vs.* Rugg, 148 U. S. 228, 238, 243.

City Bank of Ft. Worth *vs.* Hunter, 152 U. S. 512, 515.

In re Sanford Fork *vs.* Tool Co., 160 U. S. 247, 255, 256.

Counsel for petitioner understands that upon an application for mandamus in a case of this nature it is not competent to discuss any questions pertaining to the merits of the original controversy, as they are foreclosed by the final judgment of this court, so that the only matter for consideration is whether the decree of the court below has pursued the judgment and mandate of this court. The original decree of the circuit court, affirmed by the Circuit Court of Appeals, confirmed the award for and up to the sum of $357,404.02, "with interest thereon from said date" (petition, p. 3), and one of the errors assigned against that decree in this court was such allowance of interest (petition, pp. 4, 5).

The judgment of this court declares that—

> "the decree of the said United States Circuit Court of Appeals in this cause be and the same is hereby reversed with costs" (petition, p. 6).

Thus the decree below was not modified, or in part confirmed, but was absolutely reversed in its totality, while the mandate of this court does not direct the circuit court to amend or modify its decree, but directs it to enter *a* decree specifically defining what that decree shall be, namely:

> "And it is further ordered that this cause be and the same is hereby remanded to the Circuit Court of the United States for the Northern District of West Virginia, with directions to *enter a decree confirming the award for and up to the sum of $193,204.02*" (petition, p. 6).

On the face of the judgment and mandate of this court nothing can be found authorizing the allowance of interest. The action of this court is plain and unambiguous; the

decree appealed from, which did allow interest, is unqualifiedly reversed; the circuit court is not instructed to modify its former decree in any specified particulars, but is instructed, unconditionally, to enter a *new* decree in lieu and substitution of the one reversed.

The mandate does not direct that the new decree shall award interest, but, in terms, confines the circuit court to the entry of a decree "confirming the award for and up to the sum of $193,204.02" without more.

The learned judge of the circuit court treated the case as though it were a suit by the Cauca Company against the Republic of Colombia on the award, to compel the payment of some pre-existing indebtedness from Colombia to the Cauca Company, but such was not the case.

This was not an action brought on the award, nor for damages for breach of contract; nor was there any pretense of a pre-existing indebtedness from Colombia to either of the defendants.

The original controversy had no element of money damages in it. The controversy concerned the forfeiture or non-forfeiture of a railroad franchise, and the submission to arbitration was but an element in a compromise of that question by which was to be ascertained what had been expended in certain work, and not what one party had previously owed to the other.

That feature of the compromise failed through the error of the arbitrators, caused by the insistence of the defendants that the arbitrators should include matters not within the submission, thus making an award for a gross sum more than $268,000 in excess of what they had the right to include, and necessitating, either its rejection by Colombia, or its re-examination by judicial proceedings.

The Republic of Colombia was not, therefore, in the position of a defaulting debtor, to be condemned to pay interest by way of damages for such default, but was merely seeking to ascertain what the arbitrators had failed to ascertain.

Such was the view taken of the case by this court. In its opinion on the appeal this court thus states the nature of the controversy:

> "The bill is a bill *to set aside an award* under a submission entered into by the above-named parties" (appendix, p. 7).

In stating the defendant's claim the opinion says:

> "The cross-bill is *to establish the award as valid*, notwithstanding the withdrawal of the representatives named by the plaintiffs, and *prays specific performance*. The decree confirms the award after rejecting certain items. *Of course it does not attempt to order specific performance*" (appendix p. 7).

Thus the whole subject-matter is the *correction*, not the payment, of the award, and there was no basis in the proceeding for a money decree with interest against the complainant in the cause.

It is respectfully submitted that the circuit court misconstrued the judgment and mandate in this case; that the decree entered by it is not in conformity with that prescribed by this court, and that the writ of mandamus should issue as prayed.

WM. G. JOHNSON,
Counsel for the Republic of Colombia.

APPENDIX.

SUPREME COURT OF THE UNITED STATES.

No. 259.—October Term, 1902.

THE REPUBLIC OF COLOMBIA, APPELLANT, vs. THE CAUCA COMPANY AND THE COLOMBIAN CONSTRUCTION AND IMPROVEMENT COMPANY.	Appeal from the United States Circuit Court of Appeals for the Fourth Circuit.

[May 18, 1903.]

Mr. Justice HOLMES delivered the opinion of the court.

This is an appeal by the Republic of Colombia from a decree of the Circuit Court of Appeals, 113 Fed. Rep. 1020, affirming a decree of the circuit court, 106 Fed. Rep. 337, upon a bill brought by the Republic and a cross-bill by the defendant, The Cauca Company. The bill is a bill to set aside an award under a submission entered into by the above-mentioned parties. The cross bill is to establish the award as valid, notwithstanding the withdrawal of the representative named by the plaintiff, and prays specific performance. The decree confirms the award after rejecting certain items. Of course it does not attempt to order specific performance.

Before going further with the statement of facts we must dispose of an objection to the jurisdiction of this court to entertain this appeal. As a foreign government has seen fit to submit its case to the courts of the country with whose citizens its controversy exists, it would be unfortunate if through any mistake it was prevented from carrying questions of law to the court of last resort. We are of opinion that it had the right to appeal. The circuit court had jurisdiction under the Constitution, article 3, section 2, and the act of August 13, 1888, c. 866, sec. 1, 25 Stat. 434, as the suit is "a controversy between

citizens of a State and foreign States, citizens, or subjects," within the words and meaning of the act. *The Sapphire*, 11 Wall. 164, 167. The right to appeal from the decree of the Circuit Court of Appeals is given by the act of March 3, 1891, c. 517, sec. 6, 26 Stat. 826, 828, "in all cases not hereinbefore, in this section, made final." The only words of the section relied upon as making the decree of the Circuit Court of Appeals final are those which declare it so "in all cases where the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States." We see no reason to doubt that Congress was as well aware of the distinction between foreign States and foreign citizens when it passed the act of 1891 as when it passed the act of 1888, and that when it spoke of aliens it meant foreign citizens alone. We are confident that it did not dream of excluding sovereign powers that choose to sue here from the right to an appeal. The word aliens could be given that effect only by straining it beyond its natural meaning and away from the indications of the context. As the decree of the Circuit Court of Appeals is not made final by section 6, an appeal lies to this court.

Whether technically proved or not, we assume the commission making the award to have found the facts hereafter stated, and we think that they were fully warranted in doing so. The subject-matter of the award was a railroad intended to run from Buenaventura to the Pacific, via Cali, to the city of Manizales, and partly built. In 1890 one Cherry received a concession to build and operate this road, with land grants and various guaranties from the government, and with the right to transfer the concession, but all subject to the condition of the work being done in four years. Thereupon the Cauca Company was incorporated in West Virginia for the purpose, among other things, of building and operating the road, and Cherry transferred his concession to it, stipulating that he should

be employed to do the work, receive all the company's stock and bonds and various benefits of the concession. On the same day the Colombian Construction and Improvement Company also was incorporated, for many purposes, including that of building the road, and Cherry forthwith assigned to it his contract with the Cauca Company, stipulating that he should receive in return a large amount of full-paid stock of the company and $135,000 in cash. Cherry was to be employed as chief constructor of the road, and the company was to take his place under the Cauca Company's contract.

The time for building the road went by, the road was not built, and the government claimed a forfeiture. On the other hand, the Cauca Company set up that the failure was due to the fault of the government, and other justifications, and the matter became a subject of diplomatic discussion between this country and Colombia. With the merits of this controversy we have nothing to do. As a result, a submission to a special commission, as it was termed, was agreed upon and signed. The essential features of the agreement were that the company by the second article surrendered the railroad, and that Colombia agreed to pay a just indemnity, the scope of which will be considered later, and which was to be determined by the commission. The commission consisted of three—one appointed on behalf of Colombia, one on behalf of the company, and the third by agreement between the Secretary of State of this country and the Colombian minister at Washington. The commission, spoken of in the agreement in the singular, was to "determine the procedure to be followed in the exercise of the power conferred upon it, both as to its own acts and as to the proceedings of the parties." In pursuance of this power it resolved that all decisions should be by majority vote. Thereafter the case was tried, and several items were allowed to the company which it was contended by the representatives of Colombia were not within the scope of the submission. At

the end of the trial, when hardly anything remained to be done except to sign the award, the questions remaining open concerning only matters of interest which have been disallowed, the Colombian commissioner announced his resignation to the commission.

The agreement gave Colombia thirty days to appoint a new member, and on its failure the Secretary of State for the United States and the Colombian minister were to appoint him. But the commission was allowed only one hundred and fifty days "from its installation," which might be extended sixty days more for justifiable grounds. It had sat two hundred and three days when the resignation was announced. Manifestly it was possible, if not certain, that its only way of saving the proceedings from coming to naught was to ignore the communication and to proceed to the award. This it did. Colombia by its bill and argument now lays hold of the resignation of its commissioner as a ground for declaring the award void.

Colombia thus is put in the position of seeking to defeat the award after it has received the railroad in controversy and while it is undisputed that an appreciable part of the consideration awarded ought to be paid to the company under the terms of the submission. It is fair to add that the bill offers to pay the undisputed sum, but not to rescind the submission and return the railroad. We shall spend little argument upon this part of the case. Of course, it was not expected that a commission made up as this was would be unanimous. The commission was dealt with as a unit, as a kind of court, in the submission. It was constituted after, if not as the result of, diplomatic discussion in pursuance of a public statute of Colombia. It was to decide between a sovereign state and a railroad, declared by a law of Colombia to be a work of public utility. In short, it was dealing with matters of public concern. It had itself resolved, under the powers given to it in the agreement, that a majority vote should govern. Obviously that was

the only possible way, as each party appointed a representative of its side. We are satisfied that an award by a majority was sufficient and effective. We are satisfied, further, that, whatever might be the technical rule for three arbitrators dealing with a private dispute, neither party could defeat the operation of the submission, after receiving a large amount of property under it, by withdrawing or adopting the withdrawal of its nominee when the discussions were closed. See Cooley *vs.* O'Connor, 12 Wall. 391, 398; Kingston *vs.* Kincaid, 1 Wash. C. C. 448; Ex parte Rogers, 7 Cowen, 526; Carpenter *vs.* Wood, 1 Met. 409; Maynard *vs.* Frederick, 7 Cush. 247; Kunckle v. Kunckle, 1 Dall. 364; Cumberland *vs.* North Yarmouth, 4 Greenl. 459, 468; Grindley *vs.* Barker, 1 Bos. & P. 229, 236; Dalling *vs.* Matchett, Willes, 215, 217. In private matters the courts are open if arbitration fails, but in this case the alternative was a resort to diplomatic demands.

We pass now to the main and serious question of the case, which is whether the scope of the submission was exceeded by any of the items of the award. The submission was in Spanish only, and there is a dispute about the translation of the most important words. In exchange for the surrender of the concession and the railroad with all of its fixed plant, rolling stock, obras, etc., Colombia is to pay to the company "a just indemnity por las obras y trabajos (literally the works and labors), which the company may have executed during the time in which the undertaking has been in its charge, and for the rolling stock," etc. So in the following article, "The Government of Colombia and the company recognize in advance as just and sole indemnity a sum which shall equal that which the company shall prove that it has expended en los trabajos y obras ejecutados por ella en la construccion de la expressada via ferrea y en los materiales rodantes, herramientas, &c., &c., introducidos con destino a la misma via."

It is argued for Colombia that the untranslated words limit the indemnity to the immediate cost on the ground of the works and labors executed there. On the other side it is argued, especially in view of the previous dealings, that indemnity for the total cost of the enterprise was intended. Our opinion falls between these two extremes. The company, to be sure, was claiming the larger amount, but Colombia had asserted a forfeiture. The submission was a compromise, and presumably the company meant the most and Colombia the least which the words used were capable of meaning. The only fair way is to take the language in its natural sense, not straining it either way. In article 5 it is contemplated, as the means of reaching the indemnity mentioned, that the commission shall appraise obras trabajos y materiales aforesaid; that it shall examine the books and accounts of the Cauca Company in New York, and that it shall inspect on the ground los obras y trabajos of the railroad and the rolling stock. In article 10 it is said that Colombia calculates approximately that the Cauca Company has disbursed in the obra of the railroad a sum of two hundred thousand dollars (somewhat less than the cost on the ground as agreed before the commission), while the company considers that sum as much below the just price of the obras y trabajos por ella ejecutados. And the sum named is paid on account in advance for the purpose of obtaining the immediate delivery of the railway. Whether the preliminary negotiations be considered or not, it seems to us to carry out the import of the words used if we limit the indemnity to expenditures which fairly could be found to have contributed in a direct way to the result on the surface of the earth, but extend it to such expenditures, even when they took place at a distance. If the latter were not included, there was no sufficient reason for a commission meeting in New York.

It is for us to determine the scope of the commission, whatever may have been its own finding with regard to its

powers; but when its powers are established we are not called upon to revise any finding that could have been made without going beyond the line which we lay down. On this footing, subject to a further point to be mentioned, the salaries of executive officers of the Colombian Construction and Improvement Company ($108,181.42), the traveling expenses of these officers ($29,386.30), and the office expenses of the New York office ($21,727.58), properly were allowed, so far as appears. Although the facts were gone into with superfluous detail, it can not be said as matter of law that those items might not have been necessary in order to lay the tracks upon the ground. The company devoted itself wholly to the business of building the road. The initial expense naturally would be the greatest, and the company's contention was that but for Colombia the work would have been done.

It is said that the last named company was not a party to the submission, which is true. But, as we have said, it reasonably might have been found by the commission that it was assignee of the contract between Cherry and the Cauca Company, by which Cherry was to build the road and to receive the Cauca Company's stock and bonds. Therefore the work done by the construction company had to be paid for by the Cauca Company, and the result of its work was the railroad which the company surrendered. Under such circumstances we can listen to no hair splitting as to whether work done upon the road by the construction company can be called the Cauca Company's "obras y trabajos." We certainly should not disturb a finding by the commission that the cost of building, by whomsoever incurred, was part of the Cauca Company's work.

On the other hand, we can not uphold the award of $135,000, for cash paid for purchase of the concession. If, as would seem, this was the sum which the construction company was to pay Cherry for the assignment of the Cauca Company contract, it requires a layman's superiority to form

in the interest of substance to connect this with the Cauca Company at all. But assuming that connection established, the expense is too remote from cost of construction to be allowed under the words used in this submission. It was contemplated by the concession that it might come to the hands of a corporation having its headquarters elsewhere, and the expenses which we have allowed might have been found necessary, if a Virginia or New York corporation were to begin the construction of this road in Colombia. But the purchase of the right to do the job was an accident. The cost of it would not have been incurred, so far as appears, if the concession had been made to the company direct. Therefore it is not to be paid for unless we adopt the view that the company is to be made whole for all that it paid in connection with the enterprise, rather than for what it paid to get the tracks laid, assuming that it had the right to lay them. As we have said, we adopt the latter view. We think it unlikely and not within the clear meaning of the words that the government undertook to pay an additional sum because its own concession had changed hands.

It is much more obvious that the submission did not warrant charging Colombia with an extra sum of $29,200, voted by the construction company to its officers for services in securing the agreement of submission. We have indicated our reasons sufficiently above.

The award was for a single sum, which the report of the proceedings of the commission shows to have been made up of items, some of which we have considered. These items were discussed by the courts below, seemingly at the instance of Colombia, and without objection on the part of the company, and some of them were disallowed without appeal. If they are open to consideration they show that the award was made up of several items, some of which may be disallowed without affecting the rest. If they should not be considered, the only course would seem to be to presume

that the commission followed its authority, and to sustain the award for the whole original amount. Certainly they could not be given a partial consideration and be taken account of so far as to invalidate the award, and yet be denied examination on the further question whether they could not be stricken out without affecting the residue of the award.

In addition to the oral arguments, we have considered every detail of the elaborate briefs submitted and the record, but have not thought it necessary to mention many of those details or to protract our judgment to an equal length. The amount allowed by the Circuit Court of Appeals is reduced as stated by $164,200, but in our opinion the following items must stand:

Agreed cost of work on the ground and rolling stock.....	$233,909 14
Salaries of executive officers.....	108,181 42
Traveling expenses of officers....	29,385 88
Expenses and incidentals, New York office.....	21,727 58
	$393,204 02
Deduct paid on account.....	200,000 00
Amount of award.....	$193,204 02

Decree reversed and cause remanded to the circuit court with directions to enter a decree confirming the award for and up to the sum of $193,204.02.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. Original.

EX PARTE, THE REPUBLIC OF COLOMBIA,
PETITIONER.

BRIEF IN BEHALF OF CAUCA COMPANY.

STATEMENT.

The original suit was in equity, instituted by petitioner herein, against the Cauca Company and its construction com-

pany, two West Virginia Corporations. The purpose of that suit was to cancel an award in favor of the Cauca Company. The award was made October 22, 1897, and was based upon a submission dated January 4, 1897, between the Republic of Colombia and the Cauca Company.

The purpose of this submission was to compromise and settle certain controversies then existing between the Colombian government and the Cauca Company. The company had partially built a railway in Colombia under a concession which it owned. The Colombian government had attempted to forfeit the concession. The United States government interfered, diplomatically, and as a result the submission was made, and the railway surrendered. By this submission, the Colombian government agreed to pay the company the cost of constructing the road. This was to be determined by three commissioners, for whose appointment the submission provided.

The submission also provided, that such award as might be made, should be paid by the Colombian government, *"at such time, in such manner,* and on such terms *as may be determined by the commission."* (Record, p. 62, Art. x.)

The commission made an award, October 22, 1897, of $652,048.93, in favor of the Cauca Company. $200,000 of this had been previously paid, the government admitting that amount to be due, under the submission.

Acting under this submission, and by virtue of the express power therein conferred, the commission decreed that this award should be paid, "in gold coin of the United States of America, * * * *in the City of New York, on the 26th day of January,* 1898." (Record, p. 745.)

Upon the trial of the case in the Circuit Court, the learned Circuit Judge found the award to consist of certain distinct, separable items. Three of these items, aggregating $94,644.91, he

disallowed, as being without the scope of the submission. The remainder of the items, as well as the award itself, he "approved, ratified and confirmed," and decreed payment thereof, "in gold coin of the United States of America. * * * in the City of New York, on the 26th day of January, A. D. 1898, *with interest thereon from said date.*" (Record, pp. 1301 and 1304.) It will appear, therefore, that the decree of the Circuit Judge followed the exact language of the award, as to the *time* and *manner* of payment, with the addition of the italicized provision for interest, above quoted. The company had filed a cross-bill, and asked for confirmation of the award.

Both parties appealed to the Circuit Court of Appeals for the Fourth Circuit. That Court affirmed, *in toto*, the decree of the Circuit Court. (Record, p. 1318.)

The Republic of Colombia, only, appealed from the decree of the Circuit Court of Appeals. Upon such appeal this Court found that two other items of the award, aggregating $164,200, were without the scope of the submission, and disallowed them. In rejecting these two items, Mr. Justice Holmes, speaking for the Court, and referring to the various items of the award, said:

> "If they are open to consideration they show that the award was made up of several items, some of which may be disallowed *without affecting the rest.*" (190 U. S., 524-531.)

Also:

> "The amount allowed by the Circuit Court of Appeals *is reduced as stated by* $164,200, but in our opinion the following items must stand:

Agreed cost of work on the ground and rolling stock	$233,909.14
Salaries of executive officers	108,181.42
Traveling expenses of officers	29,385.88
Expenses and incidentals, New York office	21,727.58
	$393,204.02
Deduct paid on account	200,000.00
Amount of award	$193,204.02"

(Id., p. 532.)

This Court thereupon entered the following decree:

> "Decree reversed and cause remanded to the Circuit Court with directions to enter a decree confirming the award for and up to the sum of $193,204.02." (Id., p. 532.)

Upon the remanding of the cause to the Circuit Court, a decree was then entered, in terms as set forth in the petition filed in this proceeding. (Petition, pp. 7 et seq.)

The Republic of Colombia now seeks, by mandamus, to have this decree vacated, because it is alleged not to conform to the decree and mandate of this Court.

The objectionable part of the decree appears, from petitioner's brief, to be the following:

> "And it is further adjudged, ordered and decreed that the said sum of $193,204.02, in gold coin of the United States of America, be paid by the Republic of Colombia unto the Cauca Company, with interest at 6 per cent. thereon from the 26th day of January, A. D. 1898." (Petitioner's Brief, p. 3.)

It is to be noted that the language of this part of the decree follows the award as to the *time* and *kind* of payment, but

differs therefrom in omitting the *place* of payment, and in adding the interest clause.

It is also to be noted that it differs from the original decree as to the *time* and *manner* of payment, only in omitting the *place* of payment. The inclusion of the words "at 6 per cent." is an immaterial change, since the legal rate of interest in New York was, in January, 1898, and is now, 6 per cent.[1]

The only questions, therefore, involved in this proceeding, seem to be: Did the Circuit Judge err,—

1. In confirming the award in so far as it was made payable in gold coin of the United States?

2. In confirming the award in so far as it was made payable January 26, 1898?

3. In making it bear interest from that date?

ARGUMENT.

The contention of relator is that the judgment of the Supreme Court did not modify, or in part confirm, the original decree, but reversed it *in toto*. That in so far as the original decree did allow interest, it was unqualifiedly reversed. That the Circuit Judge had only power to enter a new decree, "confirming the award for and up to the sum of $193,204.02, without more." (Petitioner's Brief, pp. 4-5.)

In reply to this contention it is respectfully submitted:—

1. That the reversal of the original decree did not operate as a disallowance of the interest expressly decreed therein.

2. That interest was properly allowed even had the original decree made no provision therefor.

3. That the original award was modified, only in so far as it was beyond the scope of the submission.

NOTE.—1. See Appendix.

4. That, considering the facts, the allowance of interest was just and equitable.

I.

THE REVERSAL OF THE ORIGINAL DECREE DID NOT OPERATE AS A DISALLOWANCE OF THE INTEREST EXPRESSLY ALLOWED THEREIN.

At the outset, the provisions of the original decree of the Circuit Court seem pertinent. This decree contained several provisions, only one of which (the first hereinafter recited) was apparently considered by the Supreme Court in its reversal. Provision was made:

1. For the confirmation of the original award up to the sum of $357,404.02.
2. For the payment of this sum in gold coin of the United States of America.
3. For its payment, in the City of New York, on January 26, 1898, with interest thereon from that date.
4. For the disallowance of three separable items of the original award, aggregating $94,644.91.
5. For the disallowance of a special attorney fee allowed by the commission.
6. For a permanent injunction as to the items disallowed.
7. For the payment, by each party, of its own costs.

The amount for which the award was confirmed by the Circuit Court was made up of several distinct and separable items (Record, p. 16). Each particular item was plainly set forth, both in complainant's original bill and in the record of

the commission, which was made a part of that bill. (Record, p. 1301.)

Considering the various provisions of the original decree of the Circuit Court, and the fact that some of them were not commented on by the Supreme Court, it would seem that the narrow and literal construction of the decree of this Court, contended for by relator, is not warranted by the previous decisions.

It is well established that the word *"Reversed,"* when used in a decree, must be considered in connection with the accompanying opinion. That both must be considered, by the lower court, in connection also with the original decree of the lower court. That although the word *"Reversed"* may be used, yet the decree of the lower court will be *modified*, only, in accordance with the decree and opinion of the higher court. And that whenever a part of the decree of the lower court can possibly stand together with the decree of the higher court, *it not only ought to stand, but must stand.*

Gaines vs. Rugg, 148 U. S., 228.
Gaines vs. Latta, Id.
Latta vs. Granger, 167 U. S., 81.
Kneeland vs. American Loan & Trust Co., 138 U. S., 509.

Gaines vs. Rugg (and *Gaines vs. Latta*), *supra*, arose upon a petition for a mandamus to the Circuit Court of the United States for the Eastern District of Arkansas, to enter a decree in accordance with the decree of the Supreme Court in *Goode vs. Gaines*, 145 U. S., 141. In *Goode vs. Gaines* the defendant had improperly obtained a United States patent to certain land, was in possession, and had erected certain valuable improvements. Complainant claimed a prior right to the patent. The Circuit Court had decreed cancellation of defendant's patent, vested the title in complainant, and ordered an accounting

(which was had) of the rents, taxes and improvements. In *Goode vs. Gaines*, the Supreme Court had *reversed* the decree of the Circuit Court, ordered each party to pay one-half the costs in this Court, and remanded the case "with a direction for further proceedings in conformity with" the opinion. The Supreme Court, in its opinion, had held that the decree of the lower court as to title was correct, but as to the accounting was in error. Upon receiving the mandate of the Supreme Court the lower court allowed the whole case to be reopened, not only as to the accounting, but also as to the question of title. The Supreme Court awarded a mandamus for the entry of the decree proposed by the relator (which had been excepted to), and for a writ of possession.

In granting the mandamus the Supreme Court said:

> "Because this court was dissatisfied with the decrees in respect of the accounting, and only for that reason, it reversed the decrees; but it remanded the causes to the Circuit Court with a direction, as the opinion and the mandate explicitly state, for further proceedings to be had therein in conformity with the opinion of this court. It did not disturb the findings and decrees of the Circuit Court in regard to the title and possession, but only its disposition of the matter of accounting. *The mandate and the opinion, taken together, although they used the word 'reversed,' amount to a reversal only in respect of the accounting, and to a modification of the decree in respect of the accounting, and to an affirmance of it in all other respects.*" (p. 238.)

Again:

> *"It is, we think, very plain that so much of the decree of the Circuit Court of November* 11, 1887, *as was not disapproved by this court still stands in full force. Whatever there is to impair that decree must be sought for only in the opinion, decree and mandate of this court."* (p. 240.)

Kneeland vs. American Loan & Trust Co., supra, also emphatically supports the contention hereunder, but that case is cited and commented on under the next succeeding branch of the argument.

It would seem clear, from the foregoing cases, that the various provisions of the original decree of the Circuit Court, in so far as they were not expressly disapproved by the Supreme Court (in the language of *Gaines vs. Rugg*), 'still stand in full force.' "Whatever there is to impair that decree must be sought for only in the opinion, decree and mandate of this court."

There is absolutely nothing in the opinion of this Court, in the case at bar, which indicates a purpose to do more than to disallow the two items aggregating $164,200, of the original award. As this Court said:

> "The amount allowed by the Circuit Court of Appeals *is reduced* as stated by $164,200, but in our opinion the following items must stand," etc. (190 U. S., 524-532.)

But the reduction of the amount previously allowed did not, it is submitted, in any wise, impair the other provisions of the original decree, which required the award to be paid "in gold coin," "in the City of New York on January 26, 1898, with interest thereon from that date." It cannot be questioned that the commission had power under the submission, to include these provisions in its award. And the award did, in fact, provide for payment of the character at the place and on the date stated. The original decree did nothing more, except to add, "with interest thereon from that date." But this clause injected no new provision into the award. If the money was due

and payable January 26, 1898, it would naturally bear interest from that date until payment.

For the reason, therefore, that the provision of the decree of July 16, 1903, complained of, did not differ from that contained in the original decree, and for the reason that it was not referred to or disapproved in the opinion of this Court, and for the reason that it was within the express power conferred in the submission, the mandamus should not be granted.

II.

HAD NO INTEREST BEEN PROVIDED FOR IN THE ORIGINAL DECREE OF THE CIRCUIT COURT, NEVERTHELESS IT WAS PROPER TO PROVIDE FOR INTEREST IN THE DECREE OF JULY 16, 1903.

It is true, that there is a uniform line of decisions in this Court which hold that where the Supreme Court has simply *affirmed* the decree of the lower court, and where neither the original decree, nor the decree of affirmance makes any provision for interest, then, in executing the mandate of this Court the lower court cannot properly, for the first time, include interest in its final decree. The cases most frequently cited to sustain this contention are the following:

Himely vs. Rose, 5 Cranch, 313.
The Santa Maria, 10 Wheat., 431-442.
Boyce's Executors vs. Grundy, 9 Pet., 275-289.
Mitchell vs. Harmony, 13 How., 115.

Perkins vs. Fourniquet, 14 How., 328.
In Re Washington & Georgetown R. R. Co., 140 U. S., 91.

An examination of these cases clearly indicates that they are all distinguishable from the case at bar in the following important particulars:

1. They are all cases in which the judgment or decree of the lower court was *affirmed in its entirety*.

2. They are all cases in which there was absolutely no provision for interest in the original judgment or decree.

On the other hand, there are several well considered cases, where the original decree by the lower court was reversed, or reversed in part and affirmed in part, the appellate court saying nothing as to interest, and where a subsequent allowance of interest by the lower court was thereafter sustained by the appellate court.

Kneeland vs. American Loan & Trust Co., 138 U. S., 509.
Metcalf vs. City of Watertown, 68 Fed., 859-863-4.
The Grapeshot, 2 Woods, 42.
Appeal of Wilson (Pa.), 11 Atl., 678-680.

The case of *Kneeland vs. American Loan and Trust Company, supra*, is apparently the only case in the Supreme Court of the United States involving the subsequent allowance of interest by a lower court after the reversal or modification of a former decree of the latter court. The principle involved in this case is almost identical with that involved in the case at bar, and it seems to sustain the contentions of respondent, both as

to the meaning of the word *"Reversed"* (supra), and the validity of the decree of July 16, 1903, in so far as interest is allowed therein.

The facts in the *Kneeland* case were, in brief, as follows:

The suit was for the foreclosure of a railroad mortgage. Previous to the beginning of the foreclosure, a receiver had been appointed at the instance of a judgment creditor. Such receiver had possession of the railroad from August 1, 1883, to December 1, 1883. On the last named date the receiver under the mortgage foreclosure took possession, and continued in possession until January 1, 1885. The original decrees of the lower court awarded rentals for the use of certain rolling stock during the period of both receiverships, viz: from August 1, 1883, to January 1, 1885. Upon appeal the Supreme Court held that the allowance of rental during the first receivership, viz: from August 1st, 1883, to December 1, 1883, was improper and entered the following order:

> *"Reversed, and the cases remanded with instructions to strike out all allowances for rental prior to December 1, 1883, the time when the receiver was appointed at the instance of the mortgagees, and to allow the rentals as fixed for the time subsequent thereto."* (136 U. S., 89-103.)

The original decrees of the lower court were based upon reports of the master. These reports did not separate the valid from the invalid rentals, but gave them in a gross sum, for the year beginning August 1, 1883.

On receiving the mandates, the lower court separated the valid from the invalid rentals, and interpreted the mandates "as in effect affirming so much of the decrees as allowed these amounts, * * * * and its new decrees *awarded interest thereon from the date of the former decrees.*" This was one of the grounds alleged as error.

Mr. Justice Brewer, delivering the opinion of this Court, said:

> *"We think the ruling of the Circuit Court was correct.* The amount of the allowances for these five months was separately stated, and such allowances were sustained by this court. *While the former decrees were in terms reversed, and the cases remanded for the entering of new decrees, yet the terms of those new decrees were specifically stated, and in so far as the separate and distinct matters embraced in the former decrees were ordered to be incorporated into the new, it is to be regarded as pro tanto an affirmance.* Equity regards the substance and not the form. The rights of parties are not to be sacrificed to the mere letter, and whether the language used was reversed, modified, or affirmed in part and reversed in part, is immaterial. Equity looks beyond these words of description to see what was in fact ordered to be done. *Illinois Central Railroad vs. Turrill,* 110 U. S., 301." (Here the Court gives its reason for not making computation of amounts due and stating them in the mandates.)
>
> *Kneeland vs. American Loan & Trust Co.,*
> 138 U. S., 509-511.

In *Metcalf vs. City of Watertown, supra,* the facts were somewhat different from those in the case at bar, but, it is submitted, the cases do not differ in principle.

Metcalf had a judgment against Watertown, obtained in 1866. In 1883 he sued upon this judgment. The statute of limitations was pleaded. The Circuit Court made a special finding of facts, which sustained the averments of plaintiff's declaration, and found that the judgment sued upon had in fact been obtained on May 8, 1866, and amounted (damages and costs) to $10,207.86. But recovery was refused because it had outlawed.

Upon writ of error the Supreme Court *reversed* the judg-

ment (153 U. S., 671), held that the action was not barred by limitation, and remanded the cause, "with a direction to enter judgment for plaintiff on the findings." Nothing, however, was said as to interest.

The Circuit Judge entered judgment for the amount of the old judgment, with interest to the date of entering new judgment, viz: August 25, 1894, a total (with costs) of $32,430.83. Plaintiff subsequently moved for a judgment, based upon a computation of interest down to August 2, 1889 (the date when the Circuit Court had refused judgment), and with interest computed thereafter, upon the total, down to August 25, 1894 (the date of final judgment). This would have given plaintiff $35,685.73. The lower court denied the motion, and upon error, the Circuit Court of Appeals, Seventh Circuit, allowed plaintiff's motion.

Commenting upon the contention that interest in no instance can be allowed by a Circuit Court where the Supreme Court had reversed its decree and said nothing as to interest, the Circuit Court of Appeals said:

> "Reference has been made to the rule, which has been often declared that interest is not allowed upon judgments affirmed by the Supreme Court, unless so ordered in the judgment of affirmance. That rule is founded upon the provision of the judiciary act of 1789, c. 20, Sec. 23, whereby the Supreme Court is authorized, in cases of affirmance of any judgment or decree, to award the respondent just damages for his delay. Accordingly, 'if upon the affirmance no allowance of interest or damages is made, it is equivalent to a denial of any interest or damages.' *In re Washington & G. R. Co.*, 140 U. S., 91, 11 Sup. Ct., 673; *Boyce's Ex'rs vs. Grundy*, 9 Pet., 275, 289; *Mitchell vs. Harmony*, 13 How., 115; *Perkins vs. Fourniquet*, 14 How., 328. *That rule, it is manifest, is not applicable when the question is whether interest shall be allowed upon a verdict, when an erroneous judgment thereon has been reversed, and direction given to enter the proper judgment in favor of the prevailing*

party. In *Kneeland vs. Trust Company,* 138 U. S., 509, 11 Sup. Ct., 426, a decree was reversed for error in a part of the sum for which it was given, another distinct part, as the opinion showed, being approved. The order or mandate was 'to strike out all allowances for rental prior to December 1, 1883, * * * and to allow the rentals as fixed for the time subsequent,'—*saying nothing about interest. Upon that order, the Circuit Court gave a second decree, allowing interest from the date of the first decree, and that decree, upon a second appeal, was affirmed.*"

Metcalf vs. City of Watertown, 68 Fed., 863-4.

The case of *The Grapeshot, supra,* is almost directly in point. The action was libel, upon a bottomry bond, for supplies and repairs. The Supreme Court *reversed* the original decree of the Circuit Court, deeming the amount allowed therein excessive, and remanded case with instructions to render a decree for the amount due for supplies and repairs actually furnished. The bottomry bond provided for a premium of 19½ per cent. for the voyage, but contained no stipulation for ordinary interest. In reversing the original decree the Supreme Court made no reference either to the stipulated premium, or to ordinary interest. In the final decree the Circuit Judge allowed both the 19½ per cent. premium, as well as ordinary interest from beginning of suit, saying in part:

> "When in the opinion of the court interest should be allowed, it is included in the decree as a gross sum. *Now the Supreme Court has directed specifically* for what sum the decree in this case shall be, to-wit: The amount found due for supplies and repairs actually furnished and really necessary."
>
> * * * * * * *
>
> "But the claimant says that the question of interest has been ruled adversely to the libellant by the decree of the Supreme Court in this case. He says

that the decree of the Supreme Court in this case, 9 Wall., 145, directs this court to ascertain 'what portion of the repairs and supplies actually furnished to the ship were really necessary, and for the amount thus ascertained and approved by the court, to enter a decree for the libellants.' *That as this direction of the court says nothing about interest, none can be allowed.*

To sustain this view we are referred to the case of *Boyce's Ex'r vs. Grundy*, 9 Pet., 290; *Hemmenway vs. Fisher*, 20 How., 255; to rule 23 of U. S. Supreme Court Rules, and to Phillips' Practice, Revised Ed., 257.

The rule of the Supreme Court and these authorities apply only to cases when the judgment or decree of the lower court has been affirmed. The holding is that unless the Supreme Court, in the affirmance of a judgment or decree, allows interest, it cannot be allowed by the lower court, when called on to execute the mandate.

But in the case of The Grapeshot, the decree of the Circuit Court was reversed, and the cause sent back to the Circuit Court to ascertain the amount due libellants and with instructions to render a decree for the amount so ascertained. The Supreme Court never passed upon the question of interest. *It never disallowed interest.* The libellants are clearly entitled to it unless it is expressly disallowed. As well might it be claimed that libellants are not entitled to their premium of 19½ per cent., which is expressly provided for in the bond, because the Supreme Court makes no mention of it in its order remanding the case to this court."

The Grapeshot, 2 Woods., 42-44-46.

The case of *Wilson's Appeal, supra*, also sustains respondent's contention. An executor's account, upon audit, was surcharged $22,448.95 by the Orphans' Court, and decree was entered against the executor for $54,690.73. Upon appeal to the Supreme Court of Pennsylvania, the executor succeeded in

reducing the surcharge $15,991.65. But, pending appeal, he neither tendered nor offered to distribute the final balance due. Thereafter, the Orphans' Court charged interest upon the account pending appeal. From this interest charge the executor again appealed, but the charge was sustained. The Supreme Court said:

> "In the pending controversy, however, the appeal was taken by the accountant; and though he succeeded in reducing the surcharge, there was a large balance found against him and *this balance he neither tendered to*, nor offered to distribute among, those to whom it belonged. We are therefore of the opinion that the appellant was properly charged with interest."
>
> *Wilson's Appeal*, 11 Atl., 678 (Pa.).

It would seem, therefore, even in the absence of any provision for interest in the original Circuit Court decree, that the decree of July 16, 1903, would be unobjectionable.

III.

THE ORIGINAL AWARD WAS MODIFIED ONLY IN SO FAR AS IT WAS BEYOND THE SCOPE OF THE SUBMISSION.

Relator seems to misapprehend the real effect of the original decree of the Circuit Court, as well as the reversing decree of the Supreme Court. An essential feature of each of these decrees was, that, aside from considering and passing upon the validity of the particular items of the total amount of the award, *the award itself* was expressly ratified and confirmed as and for a valid and binding award.

Taking advantage of the improper resignation of its own commissioner, Colombia had persistently insisted in the Circuit Court, the Circuit Court of Appeals, and in the Supreme Court, that the entire award, as an award, was utterly null and void. As this Court pointed out:

> "Colombia thus is put in the position of seeking to defeat the award after it has received the railroad in controversy, and while it is undisputed that an appreciable part of the consideration awarded *ought to be paid to the company under the terms of the submission.*" (190 U. S., 524-528.)

This contention was repudiated by all the courts, and the decree of the Circuit Court, in so far as it confirmed the award as a valid award, was, in fact, *affirmed* by this Court. The opinion upon this point declares:

> "We are satisfied, further, that whatever might be the technical rule for three arbitrators dealing with a private dispute, neither party could defeat the operation of the submission, after receiving a large amount of property under it, by withdrawing or adopting the withdrawal of its nominee when the discussions were closed." (Id., p. 528.)

The award, therefore, in so far as it is within the scope of the submission, does not exist by virtue of the decree, but by virtue of the submission. The decree added nothing to the award and took nothing from it, to the extent that the latter was valid. To this extent, in all its parts and with all its provisions, it was a valid and binding award, and was expressly confirmed as such. *It*, certainly, was not "absolutely reversed in its totality" (to use the language of relator's counsel), by the decree of this Court.

Now it is perfectly plain, from the submission itself, that the commission had absolute power to fix the time within which Colombia should pay the award as well as the manner and terms of such payment. At the end of the tenth article of the Submission it is provided:

> "The government is to pay, * * * *at such time, in such manner, and on such terms* as may be determined by the commission." (Record, p. 62.)

By virtue of this power, the commission accordingly found that the Cauca Company was entitled to receive from Colombia the sum found as the cost of constructing the road,

> "in gold coin of the United States of America, which sum we hereby award to the said Cauca Company, *and which sum is to be paid* by the Republic of Colombia to the said Cauca Company *in the City of New York, on the 26th day of January*, 1898." (Record, p. 745.)

It is obvious that the amount awarded could be easily changed, without affecting the kind, place and time of payment. They were as distinct and separable provisions as was the provision making a special allowance for an attorney fee.

So were the items making up the original aggregate sum of the award. It is undisputed that these items were distinct and separable. The original bill of complaint of relator clearly set out and distinguished each of these items in detail. In addition it contained this averment:

> "Your orator further shows that it is advised and believes and therefore charges that the said items composing the totality of said pretended award being *separable*," etc. (Record, p. 16, Par. 33.)

And the Court found no difficulty in separating the good

from the bad items of the aggregate, and in confirming the former and rejecting the latter.

The original decree of the Circuit Court, as previously indicated, in confirming the award, adopted, in substance, the language of the award as to the time, kind and place of payment. Since these provisions were unimpeachable in the award, they must have been equally so in the original decree. And since the valid separable items of the award were also unimpeachable, they were necessarily payable "in gold coin of the United States of America," "in the City of New York on the 26th day of January, 1898."

It seems perfectly clear, from the opinion of this Court, that it was not intended to modify the award in so far as it was within the scope of the submission. Mr. Justice Holmes says:

> "but when its powers are established *we are not called upon to revise any finding that could have been made* without going beyond the line which we lay down." (190 U. S., 530.)

And, referring to the fact that the award was for a single sum made up of several items, he says:

> "If they are open to consideration they show that the award was made up of several items, some of which may be disallowed *without affecting the rest.*" (Id., pp. 531-2.)

If, therefore, "any finding that could have been made," by the commission, was not revised by this Court, and if the valid items of the award were not *affected* by the decree of this Court, then they were not affected at all, in any manner, and they were

due and payable at the time and place, and in the manner fixed by the commission.

In the revision of a separable award it seems to be well established that the objectionable part is *"rejected as mere surplusage."*

> 1 *Am. & Eng. Cyc. of Law*, p. 710 (1st ed.).

Moreover, suit may be maintained, in assumpsit, upon the award, to recover the valid, separable items, even though the award is for an aggregate sum. Or if such suit be for the aggregate sum, the Court would disallow the bad and render judgment for the balance.

> *Morse Arbitration*, p. 484.
> *Dalrymple vs. Whitington*, 26 Vt., 345.

If the invalid items were mere surplusage, then the other portions of the award and provisions for payment are the only relevant parts thereof, and stand as though the rejected items were never contained therein.

So in a New York case where a part of the award was valid and a part bad for uncertainty, the Court held:

> "So much of the award as directs security to be given is undoubtedly void; and *it leaves the award as though that part had been omitted*, and it had been a simple award to pay the money. * * * The giving of the security is not the consideration for anything to be done by the plaintiff. *It may, therefore, be rejected without impairing the residue of the award."*
>
> *Stanley vs. Chappell*, 8 Cow., 235.

And if suit could have been commenced on January 26, 1898, upon the valid items it is conclusive that they were due

and payable at that time, and would thereafter bear interest. (The injunction granted January 13, 1898, restrained all proceedings on the award. Record, p. 867.)

It is earnestly submitted that the decree contended for by relator would be an exceedingly dangerous one. It would re-open the question as to the kind of money in which the award should be paid. This was submitted to, and properly determined by the commission. It would re-open the question as to place of payment which was in like manner submitted and determined. Should such a decree be entered Colombia might hereafter seek to pay, at Bogata, in its own grossly depreciated money. This would certainly be a monstrous injustice, and would be tantamount to making a new contract between the parties.

Finally, in addition to what has been said, a word as to the equities involved, is pertinent. Hence—

IV.

CONSIDERING THE PREMISES, THE ALLOWANCE OF INTEREST WAS JUST AND EQUITABLE.

Relator contends that the original controversy contained no element of money damages. That it concerned only the forfeiture of a railroad franchise. *That the submission was but an element in the controversy. That relator was merely seeking to correct the award.* (Relator's Brief, pp. 5 and 6.)

This is clearly not so. The controversy concerning the forfeiture was absolutely settled, compromised and eliminated

by the Submission. (Record, p. 60, Art. I.) The sole controversy was as to the amount which Colombia should pay the Company for the cost of the railroad. (Id., p. 62, Articles IX and X.) Hence, the original, and only controversy did involve money damages.

Moreover, relator was not seeking merely "to *correct* the award." It was in fact seeking to *nullify* it. It was also seeking to nullify the valid, as well as the invalid items. It expressly disclaimed any liability of any kind or character under the award. Hence, to this extent, it failed in all courts.

The facts are, that more than seven years have elapsed since the Cauca Company, acting in good faith, surrendered its concession and transferred its railway property to Colombia.

For this, Colombia agreed to pay at such time as the Commission fixed upon, viz: January 26, 1898.

For more than seven years, then, Colombia has had the Company's railroad, and has received (so far as we know) the entire earnings and income thereof.

For more than six years it has also had, without tendering, $193,204.02 of the Company's money, for this sum became due, by express contract, January 26, 1898.

No one disputes that $33,909.14 of this sum was due and payable at that time, for Colombia, in its bill filed December 15, 1897, admitted that amount to be due, in spite of the alleged invalid award.

But if this sum was then due, it was due under the award and not otherwise, as were all of the valid items.

Relator also contends that the interest was allowed "as a penalty against" it, "for the necessary time consumed in the proceedings taken by it to rectify" the error in the award. (Relator's Brief, p. 3.)

This is also clearly not so. The costs allowed relator is the only compensation to which it is legally entitled and which the Company should pay, because of the improper items. No bad faith can be charged. The Company was originally justified in believing the award proper, based as it was upon the decision of one of the most eminent civil engineers in the country.

After the original decree, and until the original decision of the Supreme Court, the Company was likewise justified in relying upon the decree made by the learned Circuit Judge, and the Circuit Court of Appeals of the Fourth Circuit.

To disallow this interest would be to compel the Company to pay substantially $60,000, in addition to the costs against it, because relator failed to anticipate the validity of the award, as such, and of the items finally allowed by this Court.

It is true, as alleged in relator's petition (Pet., p. 4), that in its appeal to the Supreme Court it assigned error because the decree provided for interest on the award. But it is most important to note that *no error was assigned because the decree confirmed the award in so far as it was payable in gold coin of the United States, in New York, on January 26, 1898.* It would appear, therefore, that these provisions (either of the decree or award) were not appealed from, and were not submitted to or considered by this Honorable Court.

In support of its assignment of error as to interest, relator contended:

> "It is to be noted that the award was for a gross sum, without specifying the items of which it is composed, and the complainant, while contending that it was bad *in toto, could not separate* the elements of the award without the aid of a court of equity." (Appellant's Brief, p. 152.)

As a part of this argument relator contended that the allowance of interest to the Cauca Company was improper, under the rule established by this Court in *San Bernardina County vs. Southern Pacific Railroad*, 118 U. S., 417. In that case it seems to have been held that the county could not recover penalties, interest and attorney's fees upon a tax, a part of which tax was invalid.

The answer to this contention is simple. The claim that relator "could not separate the elements of the award" has been abundantly hereinbefore shown to be untrue. In its bill it not only averred that such items were distinct and separable, but it expressly and in detail separated and distinguished them.

As to the *San Bernardina* case, it was expressly based, in part, upon the previous case of—

Santa Clara County vs. Railroad, 118 U. S., 394.

By implication, the opinion in the latter case supports our contention for interest. Mr. Justice Harlan, speaking for the Court, opens his examination of the interest question as follows:

> "The next inquiry that naturally arises is, whether the different kinds of property assessed by the State Board are *distinct and separable* upon the face of the assessment, so that the company being thereby informed of the amount of the taxes levied upon each, could be held to have been in default in not tendering such sum, if any, as was legally due." (118 U. S., p. 414.)

The Court then finds that neither from the assessment roll, nor from other evidence, was it possible to have made the separation. (Id., pp. 414 to 416.)

The duty to pay or tender the valid portion of a tax, before relief against that which is invalid is granted, is a well es-

tablished equitable principle. As stated by Mr. Justice Miller in the *State Railroad Tax Cases:*

> "Before complainants seek the aid of the court, to be relieved of the excessive tax, *they should pay what is due.* Before they ask equitable relief, they should do that justice which is necessary to enable the court to hear them.
>
> It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and when in the end it is found that but a small part of the tax should be permanently enjoined, submit to pay the balance. This is not equity. It is in direct violation of the first principles of equity jurisdiction. *It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due.* They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The State is not to be thus tied up as to that of which there is no contest, by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax, *it must be tendered,* and tendered without the condition annexed of a receipt in full for all the taxes assessed."
>
> *State Railroad Tax Cases,* 92 U. S., 575-616-617.

See also—

National Bank vs. Kimball, 103 U. S., 732-733.

Palmer vs. Township, 16 Mich., 176.

In *Palmer vs. Township, supra,* Judge Cooley says:

> "He who seeks equity must do equity, and there can be no just ground for preventing the enforcement of a legal tax, unless it is so mingled with the illegal

that it is impossible to separate them." (16 Mich., p. 178.)

In the original suit, the Company did not insist upon payment of the valid, separable items as a preliminary to granting any relief to relator. But, considering the surrender of the Company's property, and the continuous subsequent enjoyment of the income by relator, as well as its retention of the purchase price of the property, it would be grossly inequitable, under the rule established in the foregoing analogous tax cases, to now permit relator to avoid payment of interest.

Moreover, if tender of these items was a prerequisite, they would necessarily bear interest. This Court has said:

> "If a debt ought to be paid at a particular time, and is not, owing to the default of the debtor, the creditor is entitled to interest from that time by way of compensation for the delay in payment."
>
> *Young vs. Godbe*, 82 U. S., 562-565.

And the established rule has been well stated by the Supreme Court of Kentucky as follows:

> "If there be a specified time for payment, and a failure to then pay, * * * then the debt should as a matter of law, bear interest from the time of such failure."
>
> *Henderson Cotton Mfg. Co. vs. Lowell Machine Shops*, 86 Ky., 668-675.

Upon the whole case, it is respectfully submitted, that for any or all of the reasons given, the writ of mandamus should not issue.*

HUGH L. BOND,
J. WALTER LORD,
JOHN W. BEAUMONT,
Counsel for Cauca Company.

[* Counsel recognize that this brief is longer than it should be, and respectfully apologize to the Court therefor. But, in extenuation, beg to explain that the limited time between the receipt of the petition and return of the order permitted only a hasty and therefore prolix consideration of the important questions involved.]

APPENDIX.

"TITLE III.

Of the Interest of Money.

"*Six per cent. to be the rate of interest.*—§1. The rate of interest upon the loan or forebearance of any money, goods, or things in action shall be six dollars upon one hundred dollars, for one year, and after that rate, for a greater or less sum, or for a longer or shorter time. But nothing herein contained shall be so construed as to in any way affect any contract or obligation made before the passage of this act. [Thus am. by L., 1879, ch. 538, taking effect Jan. 1, 1880.]"

"*How interest to be calculated in certain cases.*—§10. Whenever in any statute, act, deed, written or verbal contract, or in any public or private instrument whatever, any certain rate of interest is or shall be mentioned, and no period of time is stated for which such rate is to be calculated, interest shall be calculated at the rate mentioned, by the year, in the same manner as if the words 'per annum,' or 'by the year,' had been added to such rate."

2 Revised Statutes of New York (9th ed.), pp. 1854 and 1857. (In force Jan. 1, 1896.)

(An examination of annual volumes of Laws of New York, from 1896 to 1903, inclusive, shows no change as to the foregoing sections.)